The Science of Negotiation in Construction Disputes

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The Science of Negotiation. This paper is entitled the "science" of negotiation because "science" simply denotes the concerted effort to understand or better understand a given subject. And science is fluid, not nearly as exact as some would believe. (Math is exact: 2 + 2 = 4. Science is an ongoing discovery process; for example science is attempting to understanding climate change. It is an ongoing process). Construction disputes are often complex because they may involve technical problems, complicated schedule evaluations, murky legal issues, and financial areas which sometimes involve more judgmental calculations than simply an audit approach. Adding to the difficulty of sorting out these factors is the overreaching one of the emotions involved. These can stem from ego to fear over significant financial loss. Believe it or not, negotiations can be affected by the religious convictions of one or more parties or whether one had a dominating or nurturing parent. Whatever their cause, the parties involved in the attempt to sort out the issues and come to a reasonable resolution are often angry, feel they are being "taken" by the other party, and accuse the other party (and are accused by the other party) of lacking credibility. And they may feel fear, fear of losing, fear of damage to the business if they are not successful. Attacks are often not on the substance of the issues, but personal attacks on the character and competence of the other party. "Negotiations", if they can be called that, sometimes have more the character of two brawlers in the octagon ring that two civilized parties honestly and objectively trying to work things out reasonably. And people involved in these disputes all suffer from one common malady: they are *human*. And the parties are both sides of the table have this affliction, this human characteristic in which they are more consumed by emotions than facts and reason. So, this paper will deal with the Gemini character of a negotiation: on the one hand the objective and reasoned approach to a negotiation and the other, the human and emotional side of the negotiation. And how the conflict may be resolved . . .or not.

EGO: And at the outset a word about ego. One's ego (I can't be wrong; I must save face . . .all those things) often stand in the way of an objective evaluation of one's position and dictates one's temperament at the negotiation table. But remember: if this issue goes to Arbitration or Trial,

the arbitrators, judge and/or the jurors don't care about your ego, about your pride, about the fact that after all this time of telling others you are going to kick butt of the other side, you have had to compromise and eat a little crow. They will make a judgment call based on the facts they heard, not based on salving your emotional wounds or upholding your pride. So, try to put yourself in the same position.

Three Legs on the Stool of Successful Recovery. There are three threshholds that must be crossed for a successful claim:

A. Entitlement. That is, the contractor must ***demonstrate*** the following:

1. That the other party to the contract had a contractual or legal duty.

2. That the other party failed to perform that duty, or performed it improperly or untimely.

3. That the contractor performed its duties properly, including administrative requirements such as notification.

4. That the contractor's claim is not barred by contract provisions (such as no damages for delay or waiver provisions; or accord and satisfaction.)

B. Quantum (Cost - Damages). The contractor has the burden of demonstrating from its records the cost it is claiming and that such costs are reasonable.

C. Causal Relationship. The contractor must demonstrate that its claimed cost is the result of the entitledment issue(s) complained of. In other words, the contractor cannot use a claim to make up a bad estimate or problems incurred as a result of its own doing. And again, like a ping pong game, the owner is likely, after the contractor's presentation, to roll out a number of defenses, which then the contractor must be able to defend against.

Let's examine these three legs but first, if you are a general contractor, you must take into consideration any SUBCONTRACTOR CLAIMS. You have a duty to present those subcontractor claims (called "pass through") but you also have a duty to review and evaluate them before passing them on to the Owner. A role of the attorneys may also be to prepare what are called "pass through" or

“liquidation” agreements, which will be set forth in a later article.

ENTITLEMENT

The contractor's letter or claim should be in this format:

1."**The contractual basis of our claim is set forth below**: (Set forth the appropriate specifications, general and special conditions, codes, or other document which establishes the contractual requirements which you believe have been violated or exceeded). Remember, the contract is the ***nail on the wall*** on which you must hang your hat - your claim. Contractors too often start with their cost overruns and fail to do an adequate job of establishing entitlement. Remember also that reasonable men may differ as to contract interpretation; in fact you may have a reasonable interpretation of the language of the specifications but the opposing party may also have a reasonable and different interpretation. You will want to support your interpretation by demonstrating:

a. The basis of your estimate is consistent with your interpretation.

b. Your interpretation is reasonable and not strained just to meet your position.

c. Your interpretation is consistent with industry practice.

d. Your performance is consistent with your interpretation (for example, if you claim that core drilling is the responsibility of another party but it turns out that you performed core drilling throughout half of the project before protesting, a court may hold that one's performance is the strongest rule of interpretation; that is, if you actually did the work and did not protest, your interpretation must have been that you believed the work was in your scope of work or you wouldn’t have spent your own money without saying something about it. If as a subcontractor, you fail to protest to the general that its scheduling is incompetent and causing you damage, it may be that when you get to the end of the job and make a claim of damage due to improper scheduling, the court may hold that since you failed to protest during the course of the job, you must not have thought the general was doing such a bad job, or hold that you waived any rights that you might have had.

e. You must demonstrate that your interpretation also takes into consideration the "whole contract". A rule of contract interpretation is that you must "read the contract as a whole"; that is, you can't just select one

section of the specifications and ignore others which may more completely set forth your duties. One of the devices I use is to cut and paste on a large sheet of butcher paper all the pertinent provisions of the specifications, general and special conditions and codes that may apply. That then becomes my "whole" contract regarding the disputed issue and is a very powerful and persuasive tool when it supports your position.

The point is that the more powerful you are able to build your contractual position, the more likely you will be ultimately successful in negotiation. The further point is: understand that because reasonable men may differ, this becomes an exposure point to you. By "exposure" is meant a potential weakness to your position. You must always evaluate your "exposures" and be wary of taking an arrogant position that you are absolutely right and the other party is absolutely wrong. This is where real objectivity comes in. It is always helpful to have a "devil's advocate" - that is a third party - look over your position and scrub it, test your position aggressively and see how it stands up in the light of day. You will want to do this on every element of your claim. And if you have contributed to your problems, how about stating so up front. Eventually someone else will, so why not enhance your own credibility by accepting accountability for your own mistakes?

2. **"The factual basis of our claim is set forth below:** (now you will provide a factual and chronological narrative of why the acts or omissions of the other party violated the contractual obligations set forth above or were outside the scope of the contract. In a complex claim, you should have an introduction which is a brief explanation (an executive summary, we call it) of the claim, followed by a detailed explanation of your position, and fully documented. Construction claims are "documentation claims" - field documentation consisting of daily reports, letters, minutes of meetings, schedule updates and monthly schedule narratives, pictures (I love great pictures and word-picture diaries). The narrative should be factual, devoid of sweeping generalizations and personal attacks on the opposing party. The stronger the field documentation, the stronger your position will be in negotiation. The more anemic your documentation, the less optimistic you should be about your success.

The point is: documentation is an exposure issue. If your daily reports do not indicate the impact or damage you are complaining of, or the job conditions you are enumerating, your position is weakened . . .you have

exposure to being attacked successfully by the opposing party for failing to provide evidence of your claim. Negotiations do not begin at the bargaining table. They begin with the quality of the estimate and the estimate file, your correct interpretation of the contract, and the field documentation you maintain to properly manage your project. To the extent that they are flawed, the negotiation is flawed. Your construction attorney or consultant must play the hand you deal him - they cannot manufacture evidence nor can you after the fact. Thus, in a negotiation, you may need to accept a lower price than you believe you are entitled to, not because the other side is unreasonable, but because you didn't do your job of maintaining proper and adequate documentation during the course of the project.

3. **"Our company properly performed its contractual duties under the contract . . . (as appropriate, insert a narrative regarding the following. :**

a. Quality of Estimate: Opposing party will attack the estimate - first thing he looks at is the material/equipment estimate versus actual cost. If there is a "bust" in material, that means there is a "bust" in labor. If the schedule is very tight, did you include overtime in your estimate; if job conditions are expected to be difficult, did you take these into considerations in your estimate?

b. Workmanship

c. Schedule Performance

i. Deliveries

d. Adequate and Competent Resources

e. List all Notifications. Repeat! List All Notifications!

The point is: the opposing party is a like a pathologist, examining every part of your body (that is, your performance on the project). His intent is to discover every weakness, every defect and to use those to either defeat your claim or to mitigate his losses. So again, negotiation begins at the beginning. The stronger your job performance, the better the outcome of a negotiation. Be honest and objective in evaluating your weaknesses. When the opposing party says: "You are claiming your entire loss on this project! Are you telling me you did nothing wrong at all and every dime of your losses are attributable to me?" be prepared to have an honest response and do not be afraid to admit your own

problems and take responsibility for them (and quantify them) . If the case goes to court, these problems will be illuminated to a judge or jury, so get them out in the open honestly at the outset. To begin with, do not claim cost that is not the responsibility of the other party. If you have done so, fess up and take your loss. So, your job performance or failure of one or more of your own duties can create that dread word: EXPOSURE. Exposure to defeating or reducing your claim. Again, it is important that you have a third party scrub your claim and point out your weaknesses as well as your strong points. Too often, the failure to do that will defeat what could have been a successful negotiation and force unnecessarily the claim into court or arbitration. If you want to sell your house quickly, price it right. If you want settle your claim quickly, present it honestly and reasonably, and price it right.

4. **Evaluate whether there are any contractual or legal bars to your claim, such as:**

a. Lack of Notification

b. Accord and Satisfaction

c. Waiver

d. No Damages for Delay/Labor Impact

e. Lien Release, Waiver/Release in Pay Estimates

If there are, what is your defense when these issues are raised. Or do you have one.

The Point is: Preparation of your claim is only half a loaf. You must evaluate the owner's defenses and factor them into the value you assign to your claim and the degree to which you are willing (and should be willing) to compromise. Often, the contractor has failed to examine the terms of a contract and take exception to some of the onerous and disclaimer provisions and only after he gets into trouble, discovers that he may be barred from pursuing a given claim. So, again, the negotiation process begins at the beginning, at the time you accept the risks set forth in the contract. A contractor may be allowed some wiggle room where some of the restrictive clauses are concerned but it will still cost him . . .sometimes the entire claim. Remember, it appears that these clauses are being more strictly enforced now that in decades past and

they are certainly being used at negotiation by the opposing parties to try to avoid payment altogether or to reduce the amount they will eventually have to pay.

QUANTUM

This paper deals with the process of negotiation and is not intended to provide all the details of different forms of pricing. (Please refer to the articles on Contracts, Scope Changes, Differing Site Conditions, Delay Damages, Impact Claims, Terminations, and Pricing) For present purposes, the following should be noted:

a. **Examine the contract to determine what costs may not be recoverable.** (For example, the contract may not allow recovery of home office overhead, or interest, or attorney fees. If the contract is a cost reimbursement one, a list of allowable and unallowable costs will be enumerated.)

b. For government and total or modified total costs claims, be prepared with a **desk top audit** . . have recaps of all elements of costs supported by appropriate spread sheets and reports backing up the summaries. **The Point is: Be credible, do not be afraid of full disclosure. Check for errors or miscoding in advance. Do Not Play Games with Numbers; if for example on a federal claim that you have certified, doing so can not only lose a claim but lose your freedom.** So often I have seen a negotiation turn sour quickly because of some mathematical errors in the contractor's data. Check and double check. Do your own internal audit. **Negotiations are based on credibility, accuracy, reliability.** This is particularly true in reference to cost information that is presented to the opposing side.

c. Be prepared to defend your estimate used for obtaining the contract.

c. As in the entitlement section, take out any cost that is not attributable to the opposing side. If a modified total cost claim, double check your estimate, rework and other possible deficiencies in your own work and deduct those from your claim. As soon as the other side believes that you are trying to get him to pay for something that is really your problem, the negotiation heads south. Many negotiators believe you start off very high and then work your way down. My experience has been that if you start off at a reasonable range, clothe your claim (entitlement and cost) in accuracy and credibility, the probability of a

successful negotiation is enhanced considerably. And if during the negotiation, a weakness or error is pointed out, I have no problem quickly accepting my accountability and reducing my claim accordingly. But that is a sock that can be turned inside out: I will then say: "If I am willing to accept my accountability, then I expect that you will be willing to accept your accountability."

d. The contractor which has established separate cost codes to collect costs for additional or changed or delayed work; and who has maintained daily records which identify the effects of changes or impacts in the field; and who has effectively updated the schedule to show impact; and who has given notifications . . . .This contractor will always fare much better than the contractor who waits to the end of the project and tries to piece something together to overcome his losses.

The Point Is: Negotiation comes at the end of a long process from the estimate to the contract to performance to the claim on the table and the successful contractor learns that everything that happened up until that day when negotiation begins will be of greater significance than the negotiator's glibness and wit at the bargaining table. The contractor's cost is a culmination of recorded experiences on the project so the project manager, superintendent and foremen have more to do with the success of the negotiation than the negotiator.

CAUSAL RELATIONSHIP

The contractor is entitled only to that additional cost which was caused by the other party and for which that party is contractually responsible. The duty of the contractor in a claim is to prove just that . . .that this is the cost I am claiming and YOU caused me to incur it. **Cause and Effect.** Contractors are all smart enough to know this going into a project and should develop policies and procedures for their supervisory personnel to identify and record both the causes (entitlement) and the resultant cost. (If they don't, they will pay a price) The preferential approach is what is termed a ***discrete cost approach,*** which, through documentation (cost codes, daily reports, schedule updates, earned value reporting, et al) link the entitlement issue (cause) to the cost incurred. Contractors who fail to do so because of their own internal problems or sometimes because there are so many issues that it is very difficult to break out separately each individual and assign a cost to it (like trying to pull dioxin out of Love Canal). In those cases, the contractor attempts to use approaches such as Modified Total Cost, or some form of estimate based on industry studies (NECA,

for example).

No matter what approach is used, the contractor must demonstrate that the claimed cost is not his own responsibility but is that of the opposing party. This is the reason that the first section on **entitlement** is so important and is the gateway to a successful negotiation. The more the contractor can demonstrate the various acts/omissions of the opposing party (using timelines, fragnets, et al) the more he can get across the **probability** that **but for** these acts/omission, he would not have incurred this additional cost and therefore is should be compensated accordingly.

The Point Is: Negotiations should not start with cost. They should start with FACT FINDING, that is a presentation of the contractual issues and the facts that support the claim, and make sure these are well understood by the opposing party, for cost follows entitlement and causation. When cost negotiations bog down, I always go back to the entitlement and causation issues and try to find out where there are common agreements and where there are disagreements and then I try to narrow our misunderstandings or conflicts on these issues. The reasonable disagreement on entitlement and causation issues can be the basis of reasonable disagreement on cost, and can also be a basis for compromise. But find out first what, if any, disagreement there is on these issues and try to overcome it if possible before simply trading dollars.

PROJECT RELATIONSHIPS

During the course of the project, you can influence the **attitude** of the opposing party, and make him want you to lose any claim you think you may have, or cause the other party to be an enthusiastic adversary because of your own attitude or tactics. If you scream at meetings, write insulting letters, fail to live up to promises, this attitude may become imbedded in the mind of the other party. And who may resist every effort you make to be compensated for even a valid and reasonable claim. So, let's consider the **human issues** during project management. Humans get their feelings hurt, become angry when attacked and will attack back; become defensive when personally accused of some dereliction. Do you want to sit across the table from people you have been disrespectful of, that you have insulted or have not been as responsible as you should have been? Indeed, this is what triggers so many failed negotiations: the relationship on the project, not the validity of the claim. Remember when you are managing or superintending a project that your respectful or disrespectful attitude during the project will affect your success at the bargaining table when the job is over and

you or your boss is trying to work out a compromise instead of going to court. There is really a **karma** in this business. For the most part, if your performance on the project is respectful, professional and reliable, you will at least get the attention of the opposing party. If you have been obstreperous, unreliable, accusatorial . . .then guess what? **The Point Is: The attitude and demeanor (and reasonableness) of the opposing parties - that human side which portrays anger, defiance, defensiveness - which is expressed during negotiations may very well have been precipitated during the project because of the attitude and demeanor of the contractor's personnel.**

SUMMARY

A construction claim negotiation is a **PROCESS** which begins with the contractor's estimate and acceptance of contractual duties and risks; his performance of his own duties and compliance with contractual requirements including notice; and his ability to document the events and impacts that have occurred along the way which has given rise to his claim.

Entitlement is the gateway to a successful claim. It should be presented with objectivity and reasonableness. At the negotiation table, **fact finding** should take place before cost negotiations so the parties can attempt to determine the areas of agreement and disagreement, and close the gap to the maximum extent. In claim preparation, I never begin with cost, but with entitlement. If I cannot prove that the other party did something under the contract that he should not have done, or failed to do something he should have done, then I am not preparing to present a claim but to beg for something that isn't mine. But if entitlement is on my side, I spend a lot of time preparing that issue and how best to present it.

Cost must be accurately calculated and only cost for which the opposing party is responsible should be claimed by the contractor. The contractor should accept his own accountability, and assure that his claimed cost is reasonable and allowable under the contract.

Everything the contractor presents should be wrapped in **credibility and accuracy.** It is one thing for his interpretation of facts to be wrong, but the facts he presents must be "right on", honest, complete and correct. Test what you are told by your own people - not that they lack credibility but question whether the documents or contract backs them up. Do the pictures back them up. I have had superintendents tell me that a roof was not installed on a building until three months later than the schedule but when I asked for the progress pictures, I saw that the roof was installed exactly per the schedule. Memories do funny things

and thus the importance of real time documentation. And without documentation, we get into a "he said, she said" debate and so which party is really correct. To the maximum extent, document everything you have in your claim.

In the contractor's preparation of his claim, it is important to sometimes have a third party be a **devil's advocate** (this is often a very good use of your attorney, to have him in effect cross examine you and punch holes in your argument) to test the reasonableness of it. It is easy to convince ourselves that someone else owes us money, but a third party who is independent and objective, may be able to punch holes in our arguments. Remember, the person you are presenting your claim to can blow the negotiation away by just saying "NO" and is probably so inclined. So you do not need to give him ammunition (such as faulty facts or arguments) to say and lock into that position.

The relationships you develop during the course of the project may very well affect the outcome of a negotiation later on. Do not give the other side a reason to **want to beat you.**

In the evaluation of each element of your claim, look for areas of exposure, of potential weakness or in which the opposing party may have some defense. When day is done, it may be that these areas of exposure can become the foundation for a compromise, an honest and reasonable compromise, based on a fair appraisal of both sides of the issues. **NEVER PREPARE A CLAIM WITHOUT GIVING FULL CONSIDERATION TO THE POSITION THAT THE OTHER PARTY MAY TAKE, AND THE DEFENSES HE MAY HAVE.**

III. **Preparing for the Negotiation**. Now you have prepared a claim and submitted it to the opposing party, how do you prepare for the actual negotiation, sitting across the table from the other party.

Establish a time table with the opposing party. Ask for a written response and time for you to evaluate it. Establish a time to begin the fact finding so you can develop a good understanding of each other's positions. It is important to have a schedule or things tend to drag out.

Establish the parties who will attend and insist that they be decision-makers. Personally, I think the fewer the better. One of my techniques as a construction claims consultant is to prepare my client to conduct the negotiations. This is often more meaningful than bringing in a consultant the other side may consider just a "hired gun" and then the other side

brings in its "hired gun" who feels that he has to beat me. I don't want to be in the position of my trying "to beat the other guy or the other guy trying to outdraw me. I want to establish a venue in which the parties are honestly attempting to understand the facts and issues and develop a framework for resolution. And that often begins with the parties we bring to the table. I generally don't like the lawyers to be involved unless things fall apart or unless both attorneys are reasonable and experienced at guiding their principals through a complex negotiation. Or sometimes, the gut issues are legal ones, such as the applicability of the No Damages clause in this state, or esoteric issues like cardinal change and the lawyers need to be able to discuss local law. (Note: lawyers may be called in to prepare a memorandum which details that "what is said in the negotiation stays in the negotiation and cannot be used in subsequent proceedings. I am not opposed to lawyers being involved, please understand. But when the two principals are attempted to resolve issues on a commercial and good faith basis, injecting legalisms and often adversarialness often is an enemy of a successful negotiation. I observed one of the best trial lawyers I know bow out of a negotiation and ask the opponent's lawyer to join him because he realized that the lawyers were not value added to the process and the principals themselves needed to work things out. Great lawyer.)

Dry runs are important and often with people in the room who are not acquainted with the matters involved. The point is: the presenter must learn to tell his story simply, succinctly and clearly so that anyone can understand his position. And not be bored. I have two or three practice sessions. The first is without interruption to build confidence in the presenter. Then if I am present, I will give a general evaluation. Then on the next, I start interrupting and asking hard questions and actually try to rile the presenter. It is like playing golf: take a few practice swings before striking the ball. Then on the third, the presenter incorporates the ideas and comments from the previous ones without interruption. If the other side is going to test him, and maybe try to rile him, then let's run a scrimmage before the big game and be ready for whatever is thrown at us.

Clarity is essential in any negotiation or proceeding where the parties are attempting to resolve their differences. The great consultant or lawyer is great because of their ability to simply and clearly explain the issues. That is the role of the expert: not to come across as the know it all gunslinger, as will be mentioned, but to

be able to explain simply and factually the issues. If you can't do that, I believe it was Einstein who said, you probably don't understand the case well enough yourself.

One of the things I want to teach the negotiator is the art of listening. Covey says: "Seek first to understand". There is always this tendency to be thinking of an answer before the other person is halfway through with his statement. Learn to listen. I listen before I take notes. If I am taking notes, I may not get the full import of what the other person is saying and how he is saying it, his level of passion, his credibility or lack thereof. Learn to listen. When the other person has finished his spiel, learn to say: What I heard you say was . . ." and then give a summary of what he said. Often you will find that you really didn't get his point, or maybe you did and when you repeated it, the other person may see that it sounded pretty farfetched. Practice learning to listen. And practice learning to cause the other side of the table to listen to you. And learn to say: "I don't know. I will check on that and get back to you during the break." Don't believe that you must come across as omnipotent, all seeing and all knowing. You dig a deep hole when you try to bluff your way.

Often negotiations are bogged down not because of differences on dollars (quantum) but differences on facts. Listening and motivating the other party to listen helps close the gap on the understanding at least of the common facts and then be able to isolate those (normally) few that are in contention.

Visuals are good but they must be supported by facts and documents. And for a smaller contractor whose consultant has spent oodles of money on some really sexy graphs, that might be counterproductive as the other side may say: wow, if he can spend that kind of money on his consultant and graphics, he is not hurting so bad financially after all. Further, if the presenter is using a power point or overheads, and the audience is focused on the board, they may lose sight of the presenter whose personality and character may be a very important ingredient in getting a resolution. Visuals should be used in conjunction with the flesh and blood person making the presentation so that both are making an impact at the same time.

In preparation, prepare a BATNA (best alternative to a negotiated agreement - meaning at what level will you NOT settle and believe it better to go to

court or arbitration.) This requires some real soul searching, and objective analysis of your exposure, the importance of getting this matter settled and cash in the bank, the importance on an ongoing relationship with the other party, the potential impact on your resources if you take the case to court. **But be careful of drawing lines in the sand.** "This is my takeaway figure, and that's it!" which leaves no room for negotiation and if you do subsequently make a counteroffer lower than your take away, all credibility is lost.

Win/Win. In Getting to Yes by Harvard professor Ury, this concept is pushed a lot. The idea of compromise underlies all successful negotiations. But let's examine that for a moment. In construction claims, often things are not really black and white. Reasonable men do differ on contract interpretation; was the owner's delay in providing a decision reasonable or unreasonable? Was this a performance or prescription specification? Was the delay compensable or not? When preparing one's position, it is important to consider carefully this "**grey zone**" This is the area in which I develop a position of compromise. I am not interested in just trading numbers or halving my claim. Reasonably and objectively develop a claim which takes your position in these grey areas. That is the amount you have requested. Then take each "grey issue" and do the same: scrub it and test its strength or weakness. It is those areas which should form the basis of a compromise. If there are not weak links (and sometimes there are not), then the only basis of compromise is to "get this thing over with" and that is a **business decision** to be made, not a legal one.

Be prepared to be **patient and persistent**. Most negotiations are not settled the first day. Sometimes they can drag on for a long time and end up successfully if the parties keep diligently trying to figure out how to resolve the issues reasonably. But be mentally prepared for the first day to not go well, for the opposing party to just say "no" and be prepared to persist in a civil manner. So, think about these things before you walk into the negotiation.

IV. **GAME DAY**.

A. Some Basic Rules

1. Be Respectful and Courteous

2. Listen

3. Attack issues. Do not attack people

4. Be careful of digressions. Stay on point and keep working on attempting to get the other party to understand the issues and the facts. Stay with entitlement first – get across your contractual and factual positions clearly and persuasively before you begin cost negotiations. The stronger the entitlement presentation, the higher the likelihood of an adequate settlement of the cost issues.

5. Make sure you totally understand the position of the other party as well. Don't disregard what he is saying just because you happen to disagree with he is saying. You may not be the most objective person sitting in that room, by try to listen with an open mind, think about what is being said, and evaluate what is being said. You may still disagree but you will be better prepared to respond. Then try to narrow areas of disagreement. I like to get the parties to list the things they do agree on and often they are surprised to learn that they pretty much agree on the facts; it is either the interpretation of those facts that cause the disagreement, or it may boil down to the amount of money involved. But negotiations should be bi-partite: the first component is a fact finding. Where do the parties stand on the facts. Agree on as many as possible, narrow the ones in which there is disagreement. The second part is the negotiation of dollars. Dollars are a causal result of the facts. And then it may boil down to "one wants too much, the other wants to pay to little" – it is a matter of principal, not principle. This is where the cheese gets binding and some of the strategies which follow kick in.

6. Do not become impatient and give up. That is a strategy that some negotiators use against use. Hang in there, just like the battery. Do not lose because of the strategy of the other party. If you are going to lose, let it be because the other party had the better position, not because you got outwitted in game playing or wore you out. And explore different pathways to settlement. In many 25% of the cases I negotiate, the method of settlement is as important as the dollars involved . . .because without the method of settlement, we could not have agreed on the dollars. In some cases, there is a structured settlement (a dollar down and a dollar a week kind of thing); in several there has been a transfer of ownership in real estate; in a couple the parties agreed on a joint venture to pursue other work together and so on. But

one must really evaluate whether the “creative” method of settlement is real and will produce the desired result, or is it illusory and just a way of getting the negotiation over with.

7. Beware of too much caffeine. Try decaffeinated coffee or soda. Preferably drink water. Get rest the night before. If you aren’t prepared by then, you probably won’t improve your presentation by staying up half the night. The negotiators in the best physical shape and who are emotionally strong do the best.

8. It is okay to show passion for your position as long as you do not get carried away with it or attack the other person. "Look, I am sorry that I may seem riled up. But we have lost a ton of money, yet did a fine quality job and on schedule, and we did all the things required by the contract. And yet here we are in a grave financial condition and I can't seem to get your understanding of what happened on the job!" Always attack issues; never attack people.

9. If the other party becomes loud and belligerent, try calling a "time-out", saying you will leave the room until he has calmed down. "I came here to have a reasonable discussion of the issues and to try honestly resolve them. Yelling and screaming will not facilitate an understanding and resolution of anything. When you are ready to have a civilized conversation, I am ready." And sometimes that causes a break in negotiations for a few days but it is better than continuing in a vitriolic atmosphere which may further polarize the parties. But also you have to “know when to hold them, know when to fold them”, meaning that there may come a time when you are simply wasting your time and it is best to make the next move into mediation, arbitration or litigation as the case may be. That is usually a last resort after a real Olympian effort to keep meaningful negotiations going.

10. Again, if most of the day has gone by and the other side has made no meaningful offer, don't despair. Sometimes you need to get to the end of the day before things start happening; sometimes it takes several sessions. Do not be discouraged; if you have a solid position, you will recover in some venue. Keep plugging.

B. Strategies. I am not big on crafty and wily strategies. But I do have a few that I will share:

1. Unlike many negotiators, I am not afraid to make the first counter

offer. Many feel that they will "bet against themselves" by making a reduced offer but my approach is to say: "Look, we both came in here to try to reach a compromise. I am not afraid to try to do that. I know that some believe that by making a reduced counter offer first, that is a sign of weakness, but I think it is a sign of strength and an indication of my honest desire to work out a reasonable resolution. And I would expect that you too have the same desire and are not interested in playing games but attempting to work out some thing that is reasonable. And I am hopeful that you will submit to me for consideration an offer which comes closer to the range necessary for compromise and agreement." But often I will add: “And let me tell you how I arrived at this reduction. I did listen to your point about the timeliness of my response to the problem and I agree it was probably one of the factors which added to the cost. I am willing to take some accountability. But I would hope that you also are willing to assess your actions in this matter and to accept your share of the accountability.”

2. As I said, I do not like "final offers", or "this is my line in the sand" for you have immediately closed off the negotiation. If you have a line in the sand and the other person has a line in the sand, then you are at war: just head for court. And when I reduce my offers, I give a reason and a basis. "Okay, I understand your position regarding the modified total cost claim. I believe we have supported it adequately. However, I know that a couple of my cost codes were probably not affected by the entitlement issues and I need to "eat" those cost overruns. So I will reduce my claim accordingly." But avoid creating an impasse. So often the first offer out of the box does just that: “Look, we lost a bunch of money, you caused it and we want it all back.” Where do you go from there. Most negotiators recommend that you “start high”. Careful: in federal disputes of claims over a given amount, you must certify your claim and a false certification (that is claiming more than you are actually entitled to could create a serious problem, including disbarment). I do not want to give a figure which cannot be negotiated but I believe that any proposal which is patently unreasonable will only have a negative effect on the negotiation.

3. Sometimes it is necessary to get everyone out the room except the two principals. "Look, Mr. President, I would like to see if just you and I could spend a few minutes together alone. I do believe we have the makings of a negotiation here and if we could, as the heads of our profit centers, just sit down together I think we can figure this out." I very often find that in mediations when we can get the lawyers and consultants out of the room, the

principals can finally get things worked out. That isn't true of all lawyers. The great lawyers are great facilitators and are often very helpful in getting things resolved. But others have a tendency to act like, well, act like lawyers and sometimes create a more combative venue than is conducive to settlement discussions. Construction consultants too can be burrs under the saddles of the opposing team.

a. The Role of the Expert. I believe the most effective role of the expert is NOT that of an arrogant "I know it all" but a communicator of what the issues are. I have watched Robert Warner of Warner Associates testify in two hearings now and I must admit I was a bit jealous. He probably knows as much about scheduling as anyone on the planet, but he does not come across as a "high falutin'" wonder boy who has all the answers. In both cases, before he had concluded his testimony, he was actually having this informal conversation with the trier of fact; he was explaining in the simplest manner possible what the issues were all about, how the critical path was affected and giving the judge a real primer on scheduling, without being condescending or arrogant. He was not adversarial, did not attack the opponent's expert, and just seemed genuinely and sincerely interested in the trier of fact really understanding what this claim was all about. His role: to create understanding in an objective and honest manner. A relationship of trust had developed between Mr. Warner and the trier of fact. In both cases, he was obviously very effective. And that approach is important in negotiations as well. Often the expert comes in as though he is a gunfighter at the O.K. Corral and as everyone knows, there is always someone who wants to take down the person who thinks he is the fastest draw in the west. An expert can set himself up to be the focus of the negotiation, and the other side wanting to beat him/her down, instead of dealing with the real issues involved. Not that the expert should be a wallflower, sitting shyly in the corner. But one of the reasons the negotiation is occurring in the first place is that the issues may not be well understood by one side or the other; often by neither side. They are too focused on dollars or ego. If the expert can move the parties away from the emotional and assist them in understanding and focusing on the entitlement, causation and dollar issues and move himself out of the line of fire, he/she has done an excellent job as an expert. One of the best experts I have run into I will not name because he would be embarrassed. But in front of a judge or arbitrator, he soon becomes more of an adviser than an expert; he helps them understand the issues, both sides of the issues. He educates them on technical issues, like what in the hell is "free float" or a "kip" or the

difference between concrete and cement or whatever is the issue. He may explain his analysis of both sides, sort of in the Tevye (Fiddler on the Roof style) of saying: “Well, I looked at this issue this way . . .but on the other hand . . . .) It is more of a story book approach which is entertaining, objective and credible. In a mediation as an expert for his client, he is soon more the mediator than the mediator, helping facilitate an understanding by all of the parties the issues and perhaps a pathway to settlement. He wins. He always wins. That which is reasonable.